

Supreme Court, U.S.
FILED

No. 05-759 DEC 8 - 2005

OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT RICHARD KING,

Petitioner,

v.

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF MISSOURI,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

ROBERT RICHARD KING, *Pro Se*
14447-045
Federal Prison Camp
P.O. Box 1000
Leavenworth, KS 66048
913-682-8700

QUESTIONS PRESENTED

1. Whether the Eighth Circuit Court of Appeals erred when it denied petitioner King's Petition for a Writ of Mandamus to the District Court for the Western District of Missouri, Western Division, from the Judge's refusal to disqualify himself, pursuant to title 28 U.S.C. §453, §455 and §144.
2. Whether the Honorable Judge, Scott O. Wright, erred when he denied petitioner King's Motion for Recusal to disqualify himself, upon petitioner King's Motion, showing when the Judge demonstrated his inability to understand the essence of the case, his mental infirmities, his preconception of petitioner King's guilt and his senility by his own admission, Inter Alia relevant issues argued herein. Whether such errors by the Honorable Judge constituted a denial of petitioner King's Constitutional Right to a fair trial pursuant to the Sixth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to this action are:

1. Robert Richard King, Petitioner
2. United States District Court, Western District of Missouri, Western Division, by United States Solicitor General, Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
CITATION OF THE OPINION BELOW	1
STATEMENT OF JURISDICTION.....	1
STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	3
ARGUMENT	4
CONCLUSION	10
APPENDIX	
APPEALS COURT ORDER.....	A1
APPEALS COURT JUDGMENT.....	A2
DISTRICT COURT ORDER	B1

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Allied Chemical Corp. v. Daiiflon, Inc.</i> , 499 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 1993 (1980).....	5
<i>Gray v. University of Ark.</i> , 883 F.2d 1394 (8th Cir. 1989)	9
<i>In re Cargill, Inc.</i> , 66 F.3d 1256 (1st Cir. 1995)	5
<i>In re U.S.</i> , 158 F.3d 26 (1st Cir. 1998).....	5
<i>Knickerbocker Ins. Co., of Chicago v. Comstock</i> , 83 U.S. 258, 21 L.Ed.2d 493 (1972).....	5
<i>Liljeberg v. Health Services Acquisition Corp.</i> , 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)....	9, 10
<i>Mallard v. U.S. Dist. Court for Southern Dist. of Iowa</i> , 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989)	4, 5
<i>Moran v. Clarke</i> , 296 F.3d 638 (8th Cir. 2002).....	10
<i>United State v. Balistrieri</i> , 779 F.2d 1191 (7th Cir. 1995)	10
<i>United States v. Billmyer</i> , 57 F.3d 31 (1st Cir. 1995).....	5
<i>United States v. King</i> , 351 F.3d 859 (8th Cir. 2003)	4
<i>United States v. Poludniak</i> , 657 F.2d 948 (8th Cir. 1991), cert. denied, 455 U.S. 940, 102 S.Ct. 1431, 71 L.Ed.2d 650 (1982)	9
<i>United States v. Tucker</i> , 78 F.3d 1313 (8th Cir. 1996)	9
<i>Will v. Calvert Fire Ins. Co.</i> , 437 U.S. 655, 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978).....	5
<i>Will v. United States</i> , 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967)	5

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL PROVISIONS AND STATUTES:	
28 U.S.C. §1254(1).....	1
Title 28 U.S.C. §144	1, 4
Title 28 U.S.C. §453	1, 4
Title 28 U.S.C. §455(a)&(b).....	2, 4, 9, 10
Title 28 U.S.C. §2255	5, 7, 8

CITATION OF THE OPINION BELOW

The opinions rendered below are not reported. The District court's order denying King's motion is reproduced in Appendix B (B1). The Eighth Circuit court's Mandate is reproduced in Appendix A (A2). The Eighth Circuit court's order denying King's motion for reconsideration is reproduced in Appendix A (A1).

STATEMENT OF JURISDICTION

The Judgement/Order denying King's petition for a Writ of Mandamus, was entered on August 30, 2005, by the Eighth Circuit Court of Appeals. King's timely petition for reconsideration was denied on September 21, 2005. This petition was filed within 90 days of September 21, 2005. Jurisdiction of this Honorable Court is founded on 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §144, which provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. §453, which provides:

Each justice or judge of the United States shall take the following oath or affirmation before

performing the duties of his office: "I, _____
 _____ do solemnly swear (or affirm) that I will
 administer justice without respect to persons,
 and do equal right to the poor and to the rich,
 and that I will faithfully and impartially dis-
 charge and perform all the duties incumbent
 upon me as _____ under the Constitution and
 laws of the United States. So help me God."

28 U.S.C. §455, which provides:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; (3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by

the outcome of the proceeding; (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

STATEMENT OF THE CASE

On June 27, 2001, petitioner King, Inter Alia, were charged by indictment with conspiracy to violate the Foreign Corrupt Practices Act (Count 1); seven substantive Foreign Corrupt Practices Act violations (Counts 2-8); and two "Travel Act" violations alleging acts contrary to the Missouri Commercial Bribery Statute (Counts 9-10).

The trial commenced on June 17, 2002. At the end of the Government's case-in-chief, the trial Court dismissed the Travel Act charges (Counts 9-10) and three Foreign Corrupt Act charges (Counts 2, 3 and 4).

On June 24, 2002, the Jury returned verdicts of guilty as to the remaining charges. On November 12, 2002, King was sentenced to a term of imprisonment of thirty (30) months plus two (2) years of supervised release, and a fine of \$60,000.00.

On March 28, 2003, King appealed, seeking review of the District Court judgment. On December 15, 2003, the Eighth Circuit Court of Appeals, affirmed King's conviction

on all counts. The opinion is reported at 351 F.3d 859 (8th Cir. 2003). King's timely petition for rehearing and rehearing en banc were denied on February 19, 2004. King's timely petition for Certiorari was denied on June 14, 2004.

Petitioner King, is now pursuing collateral relief. On June 24, 2005, King filed a "Motion for Recusal of District Judge," requesting that the Honorable, Senior District Judge, Scott O. Wright disqualify himself from this case, pursuant to title 28 U.S.C. §453, §455 and §144. That motion was denied on August 8, 2005 (B1). On August 13, 2005, King timely filed a Petition for Writ of Mandamus, seeking an order to disqualify a District Judge. King's Petition for Writ of Mandamus was denied on August 30, 2005 (A2). King's timely Petition for reconsideration of his Petition for Writ of Mandamus was denied on September 21, 2005 (A1). This Petition for Writ of Certiorari follows.

ARGUMENT

I. THE EIGHTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DENIED KING'S PETITION FOR A WRIT OF MANDAMUS.

General Principles and Standards of Review

A Court of Appeals should issue a Writ of Mandamus to confine a District Court to a lawful exercise of its prescribed jurisdiction or to compel a District Court to exercise its authority when it has a duty to do so. *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989).

"There can be no doubt that, where a District Court persistently and without reason refuses to adjudicate a

case properly before it, the Court of Appeals may issue a Writ of Mandamus, in order that [it] may exercise the jurisdiction of review given by law." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 98 S.Ct. 2552, 57 L.Ed.2d 504 (1978), citing *Knickerbocker Ins. Co., of Chicago v. Comstock*, 83 U.S. 258, 21 L.Ed.2d 493 (1972).

"A party seeking Mandamus must show both, that it is a clear entitlement to the relief requested, and that irreparable harm will likely occur if the writ is withheld." *In re U.S.*, 158 F.3d 26, 30 (1st Cir. 1998); *In re Cargill Inc.*, 66 F.3d 1256, 1260 (1st Cir. 1995).

Mandamus is the proper remedy in the case at bar. Petitioner King acknowledges that a Writ of Mandamus is an extraordinary remedy. *Allied Chemical Corp. v. Daiflon, Inc.*, 499 U.S. 33, 34, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980); *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995). However, one of the primary reasons that Writs of Mandamus are disfavored by the Courts is that they contribute to "piecemeal" litigation. *Mallard*, 490 U.S. at 309; *Allied Chemical Corp.*, 499 U.S. at 35; *In re United States*, 158 F.3d at 30; *In re Cargill, Inc.*, 66 F.3d at 1259. Indeed, this Honorable Court has noted that "[t]his general policy against piecemeal appeals takes on added weight in criminal cases, where the defense is entitled to speedy resolution of the charges against the defendant(s)." *Will v. United States*, 389 U.S. 90, 96, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

In the case at bar, this well-founded concern about piecemeal litigation is exactly the reason a Writ of Mandamus should be issued immediately. Petitioner King's §2255 Motion is now before the very same Judge (Honorable Scott O. Wright), who King is seeking to disqualify from this case. In King's §2255 Motion he is alleging Judge

Wright's misconduct, his mental infirmities and his pre-conception of King's guilt.

II. THE HONORABLE JUDGE, SCOTT O. WRIGHT, ERRED WHEN HE DENIED PETITIONER KING'S MOTION FOR RECUSAL TO DISQUALIFY HIMSELF, UPON PETITIONER KING'S MOTION, SHOWING WHEN THE JUDGE DEMONSTRATED HIS INABILITY TO UNDERSTAND THE ESSENCE OF THE CASE, HIS MENTAL INFIRMITIES, HIS PRECONCEPTION OF PETITIONER KING'S GUILT AND HIS SENILITY BY HIS OWN ADMISSION.

(a) During the five-day trial, it became very clear that the Honorable Judge Wright's ability of recollection was impaired. At trial, the Judge took the bench for approximately thirty minutes, sometimes standing at his bench, and with the major portion in the presence of the jury, before he realized that he had forgotten to put on his robes. (Tr.984).

(b) At trial, Judge Wright's own words shows that he had problems with his ability to retain information. "Yeah. When you get to be 79, you get a little senile. You all have something to look forward to . . ." (Tr.985). When the Judge said that he was getting senile, he may say now that he didn't mean it, however, petitioner King doesn't think so. Petitioner King considers himself to have a good mental capability, nevertheless, he must admit that his mind is not as sharp at 71 as it was when he was a young fighter pilot.

(c) This case is a very complex case which involves thousands of pages of records. Numerous witnesses' statements were also introduced at trial. Petitioner King

submits that if the Judge could not remember to put on his robes, how could he remember details about the intricacy of this case in order to make a just determination as to whether or not King's §2255 Motion warrants relief.

(d) During the trial proceedings it became very clear that Judge Wright's main concern was not to dispense justice, rather his main concern was to beat his own trial-time record. At trial the Judge said the following that supports this contention: "Well, let me tell you something – if we don't get this case tried in this two weeks, then you're going to have to come back afterwards, because I've got some stuff set and I'm – this is not my case. You all did not luck out. This is not my case, so we've got to get it done this – with the two weeks." (Tr.52). "Well, let's finish up with this witness. Come on, let's get going here. – All right. Let's show it. Let's show it." (Tr.432). "All right. If you've got some redirect. Let's make it short." (Tr.436). "Come on, let's move on." (Tr.795). "Let's get this done." (Tr.812). "And then let's wind this up. – Come on. You're already twenty minutes over." (Tr.828). Petitioner King had been told that considering the complexity of the case, the trial would last four weeks, not just five days, and the jury would probably deliberate for four or five days, not just one hour.

(e) Moreover, at the closing of the Government's evidence, defense counsel asked the judge for a few minutes to argue Rule 29. However, it became very clear that the Judge, from the beginning¹ of the trial, presumed that King was guilty. The Judge's response to the defense counsel's request to argue Rule 29 was the following: "Oh.

¹ "You can argue well, if Kingsley was so bad, why was the defendant and these other people even fooling around with him." (Tr. 32).

I'll let you argue it after I let the jury go - but I mean you're going to be wasting your time." (Tr.758-59).

(f) Furthermore, the Judge's conduct was unbecoming that of a Senior District Judge. It was unethical and unacceptable of such a high Justice Figure. Just one example, during trial, defense counsel apologized to the Judge who responded: "Now, damn it. We got this packet made up. Goddamn it." (Tr.132-13).

Petitioner King submits, that if this Writ of Mandamus is withheld, then the Honorable Judge, Scott O. Wright, will preside over King's §2255 Motion and will make an adverse ruling, because, the Judge now has taken this action as a personal matter since petitioner King has accused him of having mental instabilities and using profanities during trial.

Furthermore, Judge Wright's recusal is justified because several issues raised on King's §2255 Motion includes the above mentioned issues.

Petitioner King states the fact that he has tried to retain an attorney to present the above mentioned issues, however, they all have said, that it will be impossible to get other Judges to order Judge Wright's recusal, since they said that all the Judges are like fraternity and will stick together. Petitioner King would like not to believe that, and has proceeded *Pro Se*, with his case.

Petitioner King states the fact, that he had to spend over one million dollars on attorney's fees and could possibly have received a lessor sentence if he had perjured himself and pleaded guilty. However, his innocence overcomes all this, and he will continue to defend himself, because he is innocent.

Title 28 U.S.C. §455(a) provides that a Judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Unlike section 455(b), which specifies circumstances constituting actual conflict of interest, the purpose of section 455(a) is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Service*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Whether a Judge actually has a bias, or actually knows of grounds requiring recusal is irrelevant – section 455(a) sets an objective standard that does not require scienter. *Id.* at 859-60, 108 S.Ct. 2194.

Under §455(a), "disqualification is required if a reasonable person who knows the circumstances would question the Judge's impartiality, even though no actual bias or prejudice has been shown." *Gray v. University of Ark.*, 883 F.2d 1394, 1398 (8th Cir. 1989). Section 455(a) "was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 858 n. 7, 108 S.Ct. 2194, 2202 n. 7, 100 L.Ed.2d 855 (1988). In determining, then, whether remand to a different District Judge is warranted to achieve the goal of ensuring "the appearance of impartiality," this Honorable Court should apply "an objective standard of reasonableness." *United States v. Poludniak*, 657 F.2d 948 (8th Cir. 1981), cert. denied, 455 U.S. 940, 102 S.Ct. 1431, 71 L.Ed.2d 650 (1982).

In the case at bar, it is the appearance of impartiality that matters, not actual bias. *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996).

By enacting section 455(a), Congress sought to eradicate not only actual, but also the appearance of impropriety in the Federal Judiciary. *Id.* at 860. See also *Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002).

This Court has applied a three-factor test to determine whether a judicial action taken in violation of section 455(a) should be remedied by vacatur. This test requires a Court to consider: “[1] the risk of injustice to the parties in the particular case, [2] the risk that the denial of relief will produce injustice in other cases, and [3] the risk of undermining the public’s confidence in the judicial process.” *Id.*

When a Judge denied a motion to disqualify himself under title 28 U.S.C. §455(a), the moving party’s sole recourse is to apply to the Appeals Courts immediately for a Writ of Mandamus. *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985).

CONCLUSION

Wherefore, petitioner King respectfully moves this Honorable Court on the facts and for the reasons set forth herein, to grant this petition, so that petitioner King may receive justice. Justice done late is better than justice not done at all.

Respectfully submitted,

ROBERT RICHARD KING, *Pro Se*
14447-045
Federal Prison Camp
P.O. Box 1000
Leavenworth, Kansas 66048

A1

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 05-3319

In re: Robert Richard King,	*	Petition for
Petitioner.	*	Writ of Mandamus
	*	

Petitioner's motion for reconsideration of this court's order of August 30, 2005, has been considered by the court and is denied.

September 21, 2005

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

A2

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 05-3319

In re: Robert Richard King,	*	Petition for
Petitioner.	*	Writ of Mandamus
	*	

JUDGMENT

Petition for writ of mandamus has been considered by the court and is denied. Mandate shall issue forthwith.

(5360-010199)

August 30, 2005

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

B1

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ROBERT RICHARD KING,)	
)	
Movant,)	Case No.
)	05-0545-CV-W-SOW-P
vs.)	
)	Crim. No.
UNITED STATES)	01-00190-01-CR-W-SOW
OF AMERICA,)	
)	
Respondent.)	

ORDER

This case involves a motion for relief pursuant to 28 U.S.C. § 2255. Having reviewed the record, it is **ORDERED** that movant's "Motion for Recusal of District Judge" (Doc. No. 4) is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri,

Dated: 8/8/05.
